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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MAY 24 1995

MEMORANDUM

SUBJECT: Final Policy Toward Owners of Property Containing Contaminated Aquifers

FROM: Bruce M. Diamond, Director
Office of Site Remediation Enforcement

TO: Regional Counsel (Region 1-10)
Waste Management Division Directors (Region 1-10)
Brownfields Coordinators (Regions 1-10)

Attached please find the final "Policy Toward Owners of Property Containing Contaminated Aquifers." This Policy states the agency's position that, subject to certain conditions, where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement actions against the owner of such property to require the performance of response actions or the payment of response costs. Further, as outlined in the policy, EPA may consider de minimis settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

The development of this policy was announced by the Administrator as part of the Superfund Administrative Reforms. It is also a component of the Agency's Brownfields Initiative to remove barriers to economic redevelopment.

The comments received from many Regional and Headquarters offices, as well as the Department of Justice, were very helpful in developing this Policy. I appreciate your assistance, especially given the short turnaround time.

EPA intends to publish this Policy in the Federal Register within the next 30 days.

If you have any questions about this Policy, please call Ellen Kandell at 703-603-8996, mail code 2273-G or by FAX at 703-603-9117 or 603-9119.

Attachment

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Policy Towards Owners of Property Situated Above Contaminated Aquifers

I. INTRODUCTION

A. Summary

This policy addresses the liability under CERCLA of owners of property where hazardous substances have come to be located solely as the result of migration in an aquifer from a source outside the property. It is EPA's position that such owners are not required to investigate or prevent the acts that caused the original release, or to contain or remediate the contamination, in order to establish a defense to liability under Section 107(b)(3) of CERCLA. EPA will not take enforcement actions against such property owners to require such owners to undertake response actions or pay response costs, provided that the other elements of Section 107(b)(3) are satisfied. Further, EPA may offer de minimis settlements under Section 122(g)(1)(B) of CERCLA where necessary to protect such landowners from contribution suits.

B. Background

This policy addresses the liability of owners of property at which hazardous substances have come to be located solely by means of migration in a contaminated aquifer, from a source outside the property. Nationwide there are numerous sites that are the subject of response actions under CERCLA due to contaminated groundwater. While the sources of the groundwater contamination are usually localized, it is often difficult to contain and prevent the movement of contamination within an aquifer. As a result, any person owning property to which contamination has migrated in an aquifer faces potential liability as an "owner" under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9601(a)(1), even where such owner has had no participation in the handling of hazardous substances, and has taken no action to exacerbate the release.

Some owners of property situated above contaminated aquifers have experienced difficulty selling these properties or obtaining financing for development because prospective purchasers and lenders sometimes view the potential for CERCLA liability as a significant risk. The Agency is concerned that such unintended effects are having an adverse impact on property owners and on the ability of communities to develop or redevelop property for productive use.

EPA is issuing this policy to address the concerns raised by owners of property to which contamination has migrated in an aquifer, as well as lenders and prospective purchasers of such property. The intent of this policy is to reduce the uncertainty regarding the possibility of EPA actions against these landowners

and thereby lower the barriers to transfer and productive use of such property. EPA seeks to provide a nationally consistent approach on this issue.

C. Existing Agency Policy

This policy is related to other guidance that EPA has issued. The Agency has previously published guidance on issues of landowner liability, the third party defense and de minimis settlements. Moreover, in numerous EPA policies, EPA has asserted its enforcement discretion in determining which parties not to pursue.

Some owners of property to which contamination has migrated in an aquifer have asked EPA for individual assurances that the Agency not take an enforcement action against them for performance of the response action or payment of response costs. The Agency has not been able to provide individual landowners with assurances of no enforcement action outside the framework of a legal settlement. Although this policy articulates EPA's interpretation of CERCLA with respect to the liability of certain landowners, this policy does not alter EPA's policy of not providing no action assurances.

II. BASIS FOR THE POLICY

Section 107(a)(1) of CERCLA imposes liability on an owner or operator of a "facility" from which there is a release or threatened release of a hazardous substance. A "facility" is defined under Section 101(9) as including any "area where a hazardous substance has . . . come to be located." The standard of liability imposed under Section 107 is strict, and the government need not prove that an owner contributed to the release in any manner to establish a prima facie case. However, Section 107(b)(3) provides an affirmative defense to liability where the release or threat of release was caused solely by "an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant . . ." In order to invoke this defense, the defendant must additionally establish that "(a) he exercised due care with respect to the hazardous substance concerned taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3).

To address concerns that strict liability under Section 107(a)(1) could cause inequitable results with respect to landowners who had not been involved in hazardous substance disposal activities, Congress authorized the Agency to enter into

de minimis settlements with certain property owners under Section 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622 (g)(1)(B). Under this Section, when the Agency determines that a settlement is "practicable and in the public interest", it "shall as promptly as possible reach a final settlement" if the settlement "involves only a minor portion of the response costs at the facility concerned" and the Agency determines that the potentially responsible party: "(i) is an owner of the real property on or in which the facility is located; (ii) did not conduct or permit the generation, transportation, storage, treatment or disposal of any hazardous substance at the facility; and (iii) did not contribute to the release or threat of release .... through any act or omission."

The requirements which must be satisfied in order for the Agency to consider a settlement with landowners under the de minimis settlement provisions of Section 122(g)(1)(B) are substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense under Section 107(b)(3), as described above.

An owner of property who is not involved in handling hazardous substances is typically unable to detect by reasonable means when or whether hazardous substances have entered an aquifer from a source outside the property, or to detect whether the hazardous substances have migrated in the aquifer to his or her own property. Based on EPA's interpretation of CERCLA, it is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative acts to investigate or prevent the activities that gave rise to the original release in order to satisfy the "due care" or "precautions" elements of the Section 107(b)(3) defense.

Not only is groundwater contamination difficult to detect, but once identified, it is difficult to mitigate or address without extensive studies and often invasive pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, will not, except in exceptional circumstances, be a failure to exercise "due care" or "take precautions" within the meaning of Section 107(b)(3).

The latter conclusion does not necessarily apply in the case where the property contains a groundwater well, the existence or operation of which may affect or exacerbate the migration of contamination in the affected aquifer. Application of the "due care" and "precautions" tests of Section 107(b)(3) and the appropriateness of a de minimis settlement under Section 122(g)(1)(B) will require a fact-specific analysis of the circumstances, including but not limited to the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer. Accordingly, this Policy does

not apply in the case where the property contains a groundwater well, the existence or operation of which may affect or exacerbate the migration of contamination in the affected aquifer. In such a case, however, the Section 107(b)(3) defense may be available, or a Section 122(g)(1)(B) de minimis settlement may be appropriate, depending on the case-specific facts and circumstances.

III. STATEMENT OF POLICY

Based on the Agency's interpretation of CERCLA, existing EPA guidance, and EPA's Superfund program expertise, it is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of migration in an aquifer from a source outside the property, the owner of the property is not required to take any affirmative acts to contain or remediate the contamination in order to satisfy the "due care" or "precautions" elements of Section 107(b)(3) of CERCLA. Such an owner is not liable under CERCLA, provided that the other elements of Section 107(b)(3) are satisfied. In these circumstances, EPA will not take enforcement actions against such property owners to require such owners to undertake response actions or pay response costs, provided that the conditions below are satisfied:

A) The landowner did not cause, contribute or exacerbate the release or threat of release of any hazardous substances, through an act or omission. The failure to take affirmative actions to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, except in exceptional circumstances, constitute an "omission" by the landowner within the meaning of this condition.

B) The original release of hazardous substances that migrated to the property in an aquifer was caused by the act or omission of a third party other than an employee or agent of the landowner, or of one whose acts or omissions occur in connection with a direct or indirect contractual relationship with the landowner. This condition derives from Section 107(b)(3) of CERCLA.

Under Section 101(35)(A) of CERCLA, a "contractual relationship" for this purpose includes any instrument transferring title to or possession of real property, except in limited specified circumstances. Thus, EPA must examine whether the landowner acquired the property, directly or indirectly, from a person that caused the original release (keeping in mind that the original release took place on a different property, and then resulted in the migration of hazardous substances to the property at issue in an aquifer).

Even if the landowner acquired the property, directly or indirectly, from a person that caused the original release, this may or may not constitute a "contractual relationship" precluding the availability of the Section 107(b)(3) defense (and hence

precluding the application of this Policy). Pursuant to Section 101(35)(A)(i), there is no such "contractual relationship" if, at the time of the acquisition, the landowner "did not know and had no reason to know that any hazardous substance which is the subject of the release . . . was disposed of on, in, or at the facility." EPA does not interpret this requirement to obligate a person acquiring property to conduct any investigation of property other than that which is being acquired in order to preserve such person's eligibility for the Section 107(b)(3) defense or for application of this Policy.

Moreover, pursuant to Section 101(35)(A)(iii), an acquisition by inheritance or bequest does not give rise to a "contractual relationship."

Finally, even if the landowner has a "contractual relationship" with the person that caused the original release by reason of the landowner's direct or indirect acquisition of the property from such person, the Section 107(b)(3) defense (and this Policy) will be available if the acts or omissions that caused the release did not occur "in connection with" that relationship. In particular, if the acts or omissions causing the original release took place **after** the time that the property in issue had already been transferred by the person who committed such acts, such acts or omissions would not be deemed to be "in connection with" the contractual relationship.

C) The landowner exercised due care considering the characteristics of such hazardous substance, in light of all relevant circumstances and took precautions against a third party's foreseeable acts or omissions and the resulting consequences. Under this Policy, the requirements of due care and precautions do not require the landowner to take affirmative steps to detect, contain, or remediate such contamination.

This Policy does not apply where there is another source of contamination on the landowner's property or basis for CERCLA liability, other than the contamination that migrated in an aquifer from a source outside the landowner's property, or if the property owner fails to comply with any EPA information request or other CERCLA obligations.

The Policy applies to residential and commercial property owners so long as they can satisfy the conditions stated in the Policy.

This Policy does not apply to Federal facilities.

In appropriate circumstances, EPA may exercise its discretion under Section 122(g)(1)(B) to offer de minimis settlements to landowners that satisfy the foregoing conditions. Offers of such settlements may be particularly appropriate where such a landowner has been sued or threatened with contribution suits, or where such a landowner actively requests such a settlement. EPA's Guidance on Landowner Liability and Section

122(g)(1)(B) De Minimis Settlements should be consulted in connection with any such settlement offer or negotiation.

In exchange for a covenant not to sue from the Agency and statutory contribution protection under Sections 113(f)(2) and 122(g)(5) of CERCLA, EPA may seek consideration from the landowner, such as the landowner's full cooperation in evaluating the need for or implementing a response action at the site, including providing access to, or institutional controls on such property.

The Agency intends to use its Section 104(e) information gathering authority under CERCLA, 42 U.S.C. § 9604(e), to verify the presence of the conditions under which the Policy would be applied, unless the source of contamination and lack of culpability of the property owner is otherwise clear. Moreover, enforcement discretion would be applied only so long as all conditions, supported by the owner's response to EPA's information requests, are met.

This Policy does not constitute rulemaking by the Agency and is not intended and cannot be relied on to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Furthermore, the Agency may take action at variance with this Policy.

For further information concerning this Policy, please contact Ellen Kandell in the Office of Site Remediation Enforcement at (703) 603-8996.

United States Environmental Protection Agency

Office of Enforcement and Compliance Assurance

November 1995

EPA

Policy Toward Owners of Property Containing Contaminated Aquifers

Office of Site Remediation Enforcement
Policy and Program Evaluation Division 2273G

This fact sheet summarizes a new EPA policy regarding groundwater contamination. The "Policy Toward Owners of Property Containing Contaminated Aquifers" was issued as part of EPA's Brownfields Economic Redevelopment Initiative which helps states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields. Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.

EPA issued this policy to help owners of property to which groundwater contamination has migrated or is likely to migrate from a source outside the property. This fact sheet is based on EPA's interpretation of the Comprehensive Environmental Response, Compensation , and Liability Act (CERCLA, commonly known as Superfund) and existing EPA guidance. Under the policy, EPA will not take action to compel such property owners to perform cleanups or to reimburse the agency for cleanup costs. EPA may also consider *de minimis* settlements with such owners if they are threatened with law suits by third parties.

Background

Approximately eighty-five percent of the sites listed on the National Priorities List involve some degree of groundwater contamination. The effects of such contamination are often widespread because of natural subsurface processes such as infiltration and groundwater flow. It is sometimes difficult to determine the source of groundwater contamination.

Under Section 107(a)(1) of CERCLA (also found at 42 United States Code § 9607(a)(1)), any "owner" of contaminated property is normally liable regardless of fault. This section of CERCLA creates uncertainty about the liability of owners of land containing contaminated aquifers who did not cause the contamination. This uncertainty makes potential buyers and lenders hesitant to invest in property containing contaminated groundwater. The intent of the Contaminated Aquifer Policy is to lower the barriers to the transfer of property by reducing the uncertainty regarding future liability. It is EPA's hope that by clarifying its approach towards these landowners, third parties will act accordingly.

Policy Summary

EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or the payment of clean-up costs where: 1) hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and 2) the landowner did not cause, contribute to, or aggravate the release or threat of release of any hazardous substances. Where a property owner is brought into third party litigation, EPA will consider entering a *de minimis* settlement.

Elements of the Policy

There are three major issues which must be analyzed to determine whether a particular landowner will be protected from liability by this policy:

- the landowner's role in the contamination of the aquifer;
- the landowner's relationship to the person who contaminated the aquifer; and
- the existence of any groundwater wells on the landowner's property that affect the spread of contamination within the aquifer.

Landowner's Role in the Contamination of the Aquifer

A landowner seeking protection from liability under this policy must not have caused or contributed to the source of contamination. However, failure to take steps to mitigate or address groundwater contamination, such as conducting groundwater investigations or installing groundwater remediation systems, will not, in the absence of exceptional circumstances, preclude a landowner from the protection of this policy.

Landowner's Relationship to the Person who Caused the Aquifer Contamination

First, this policy requires that the original contamination must not have been caused by an agent or employee of the landowner. Second, the property owner must not have a contractual relationship with the polluter. A contractual relationship includes a deed, land contract, or instrument transferring possession. Third, Superfund requires that the landowner inquire into the previous ownership and use of the land to minimize liability. Thus, if the landowner buys a property from the person who caused the original contamination after the contamination occurred, the policy will not apply if the landowner knew of the disposal of hazardous substances at the time the property was acquired. For example, where the property at issue was originally part of a larger parcel owned by a person who caused the release and the property is subdivided and sold to the current owner, ***who is aware of the pollution and the subdivision***, there may be a direct or indirect "contractual relationship" between the person that caused the release and the current landowner. In this instance, the owner would not be protected by the policy.

In contrast, land contracts or instruments transferring title are not considered contractual relationships under CERCLA if the land was acquired after the disposal of the hazardous substances and the current landowner did not know, and had no reason to know, that any hazardous substance had migrated into the land.

The Presence of a Groundwater Well on the Landowner's Property and its Effects on the Spread of Contamination in the Aquifer

Since a groundwater well may affect the migration of contamination in an aquifer, EPA's policy requires a fact-specific analysis of the circumstances, including, but not limited to, the impact of the well and/or the owner's use of it on the spread or containment of the contamination in the aquifer.

Common Questions Regarding Application of the Policy

"If a prospective buyer knows of aquifer contamination on a piece of property at the time of purchase, is he or she automatically liable for clean-up costs?"

No. In such a case the buyer's liability depends on the seller's involvement in the aquifer contamination. If the seller would have qualified for protection under this policy, the buyer will be protected. For example, if the seller of the property was a landowner who bought the property without knowledge, did not contribute to the contamination of the aquifer and had no contractual relationship with the polluter, then the buyer may take advantage of this policy, ***despite*** knowledge of the aquifer contamination.

In contrast, if the seller has a contractual relationship with the polluter and the buyer ***knows*** of the contamination, then this policy will not protect the buyer.

"If an original parcel of property contains one section which has been contaminated by the seller and another uncontaminated section which is threatened with contamination migrating through the aquifer, can a buyer be protected under the policy if he or she buys the threatened section of the property?"

The purchase of the threatened parcel separate from the contaminated parcel establishes a contractual relationship between the buyer and the person responsible for the threat. This policy will not protect such a buyer unless the buyer can establish that he or she did not know of the pollution at the time of the purchase and had no reason to know of the pollution. To establish such lack of knowledge the buyer must prove that at the time he acquired the property he inquired into the previous ownership and uses of the property.

Protection from Third Party Law Suits

Finally, EPA will consider *de minimis* settlements with landowners who meet the requirements of this policy if a landowner has been sued or is threatened with third-party suits. A *de minimis* settlement is an agreement between the EPA and a landowner who may be liable for clean up of a small portion of the hazardous waste at a particular site. To be eligible for such a settlement, the landowner must not have handled the hazardous waste and must not have contributed to its release or the threat of its release. Once the EPA enters into a *de minimis* settlement with a landowner, third parties may not sue that landowner for the costs of clean-up operations.

Whether or not the Agency issues a *de minimis* settlement, EPA may seek the landowner's full cooperation (including access to the property) in evaluating and implementing cleanup at the site.

For Further Information

This policy was issued on May 24, 1995 and published in the *Federal Register* on July 3, 1995 (volume 60, page 34790). You may order a copy of the policy from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5825 Port Royal Rd., Springfield, VA 22161.

Orders must reference NTIS accession number **PB96-109145.**

For telephone orders or further information on placing an order, call NTIS at:

(703)487-4650 for regular service, or
(800)553-NTIS for rush service.

For orders via e-mail/Internet, send to the following address:

orders@ntis.fedworld.gov

For more information about the Contaminated Aquifer Policy, call Ellen Kandell at (703)603-8996.